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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

WILLIAM E. HALL, ET AL, Petitioners

v.

JIMMIE LYNN MARTIN, ET AL

PETITION FOR A WRIT OF CERTIORARI TO THE
TO THE SUPREME COURT OF THE STATE OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Equal Protection Clause of the Fourteenth Amendment prevents application of the parental immunity doctrine to barr Petitioner Katherine Singleton's action for negligence against the non-adopting step-father, mother and deceased father.

2. Whether the Due Process Clause of the Fourteenth Amendment prevents application of the parental immunity doctrine to barr Petitioner's action for negligence against her non-adopting step-father, mother and deceased father.

LIST OF PARTIES

Petitioners

WILLIAM E. HALL, AS NEXT FRIEND OF KATHERINE SINGLETON and KATHERINE SINGLETON

Respondents

JIMMIE LYNN MARTIN, BRENT MARTIN and WILLIAM SINGLETON

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

No. _____

WILLIAM E. HALL, ET AL, Petitioners

v.

JIMMIE LYNN MARTIN, ET AL

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

TO THE HONORABLE SUPREME COURT:

Petitioners, William E. Hall, as next friend of Katherine Singleton and Katherine Singleton, petition for a writ of certiorari to review the denial of writ of error of the Supreme Court of the State of Texas and the judgment of the Ninth Court of Appeals of the State of Texas at Beaumont.

OPINIONS BELOW

The opinion of the Ninth Court of Appeals of the State of Texas (*see* App. A, *infra*) is reported at 851 S.W.2d 905 (Tex. App. - Beaumont 1993, writ denied). The Supreme Court of the State of Texas denied

writ (*see* App. D, *infra*) and Motion For Rehearing (*see* App. E, *infra*).

JURISDICTION

The judgment of the Ninth Court of Appeals was entered on March 25, 1993 (*see* App. B, *infra*). Petitioners' timely Motion For Rehearing was overruled on April 15, 1993 (*see* App. C, *infra*). Petitioners' timely Application For Writ of Error to the Supreme Court of Texas was denied on September 10, 1993 (*see* App. D, *infra*). Motion For Rehearing was denied on October 27, 1993 (*see* App. E, *infra*). This denial is final and no other State appellate remedies are available to Petitioners. Rules 130 and 133, TEX. R. APP. PRO. The jurisdiction of this Court is invoked pursuant to U.S. Supreme Court Rule 10.1(b) and (c) U.S.C. due to conflicting state and federal decisions and the importance of the constitutional question involved.

CONSTITUTIONAL PROVISIONS AND STATE LAW INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides in relevant part:

> nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. The parental immunity doctrine recognized by the Texas Supreme Court in *Felderhoff v. Felderhoff*, 473 S.W.2d 928 (Tex. 1971) and applied against Petitioners in *Hall v. Martin*, 851 S.W.2d at 909-10.

STATEMENT

The action underlying this appeal is a claim for damages for grievous personal injuries, including serious brain damage, sustained by fourteen year old Katherine Singleton while she was a passenger in a motorcycle wreck on June 2, 1987. A negligence suit was originally brought by

Katherine's mother, Jimmie Lynn Martin, individually and as next friend of Katherine Singleton, against various Defendants in cause number 87-06-02110-CV, of the 221st Judicial District Court of Montgomery County, Texas. Jimmie Lynn Martin was countersued by the Defendants for contribution and indemnity based on her alleged negligence. A defense was provided to Jimmie Lynn Martin through her automobile and homeowners' insurance policies. (*See*, Tr., Vol. III, 29, Plaintiffs' Response in Opposition, p. 3).

Suit was thereafter amended by ad litem William Hall, as next friend of Katherine Singleton, naming Respondent Jimmie Lynn Martin as a Defendant, alleging among other things, her negligent failure to provide and/or require Katherine to wear a helmet. (*See* Tr., Vol. I, 2, Plaintiffs' Ninth Amended Original Petition, p. 1-3). State law requires that all motorcycle operators and passengers operating on public roads wear

an approved safety helmet.[1] Later pleadings of Petitioner William Hall were amended to name Respondents Brent Martin, Katherine's step-father, and William Singleton, her non-custodial father, as Defendants for their negligence. (*See*, Tr., Vol. I, 5, Plaintiffs' Tenth Amended Original Petition). Both of these Defendants had permitted Katherine to operate a motorscooter on public roads without wearing a helmet and had never instructed her to wear a helmet. (*See*, Tr. Vol. III, 30, p. 9; 31, p. 9).

The Respondents filed separate Motions For Summary Judgment, which the trial court

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[1]Article 6701c-3 provides:
Sec. 2. (a) Except as provided by Subsection (b) of this section [medical exemption for those over eighteen years of age], a person may not operate a motorcycle on a public street or highway of this state unless he wears protective headgear that meets standards adopted by the Department of Public Safety, nor may any person carry a passenger on a motorcycle on a public street or highway of this state unless the passenger wears protective headgear that meets standards adopted by the Department of Public safety, nor may any person ride as a passenger on a motorcyle on a public street or highway of this state unless he wears protective headgear that meets standards adopted by the Department of Public Safety. Vernon's Ann. Civ. St. Art. 6701c-3

granted. The cause was severed by the trial court as to the Respondents only.

The Petitioners perfected appeal against the Respondents and appeal was brought in the Ninth Court of Appeals at Beaumont, Texas. The Court of Appeals affirmed the trial court, with Justice Burgess dissenting (*see* App. A, *infra*). The Petitioners timely filed a Motion For Rehearing which was overruled on April 15, 1993 (*see* App. C, *infra*).

On May 14, 1993, Petitioners filed their Application For Writ of Error to the Texas Supreme Court. On September 10, 1993, the Application was denied (App. D) and Petitioners' Motion For Rehearing was overruled on October 27, 1993 (*see* App. E, *infra*).

At the trial court, Petitioners maintained that the parental immunity doctrine, if applied against the seriously injured minor Katherine Singleton, was unconstitutional. (*See*, Tr., Vol. III, 29,

30 and 31, Plaintiffs' Responses In Opposition To Motion For Summary Judgment of Lynn Martin, pp. 34-36; William Singleton, III, pp. 35-37 and Brent Martin, pp. 36-39; Tr., Vol. I, 2, Plaintiffs' Ninth Amended Original Petition, p. 13; Tr., Vol. III, 14; Plaintiffs' Twelfth Amended Original Petition, p. 19). Likewise, in the Court of Appeals, Petitioners contended the doctrine was unconstitutional on its face or as applied as violative of equal protection. (*See* R. _____ Brief of Appellants, pp. 17-20).

The opinion of the Court of Appeals cursorily discussed the constitutionality question (*see* App. A at 910). Justice Burgess' dissent recognized the constitutional issues involved, holding that equal protection was violated under the Texas Constitution by the parental immunity doctrine. *Id.* at 912-13. Petitioners again raised the constitutionality issue, both

state and federal, in their Motion For Rehearing (*see* R. ____, Motion For Rehearing, pp. 7-9).

When Application For Writ of Error was made to the Texas Supreme Court, Petitioners brought five points of error (Points of Error 19-24) in regard to the unconstitutionality of the parental immunity doctrine as violating both the equal protection clause and due process clause of the Fourteenth Amendment. (*See* R. _____ Application For Writ of Error, pp. 25-29).

REASONS FOR GRANTING THE PETITION

Petitioners submit that the appellate courts of the State of Texas have incorrectly decided a federal question of such importance that this decision should be corrected and settled by this Court. Moreover, the decision conflicts with case authority from the highest state courts of other jurisdictions. The parental immunity doctrine in Texas should be declared

unconstitutional under both the due process and equal protection clauses of the Fourteenth Amendment.

The Ninth Court of Appeals of the State of Texas held that the parental immunity doctrine was constitutional even though as applied it would totally bar an action based on negligence by Petitioner Katherine Singleton against Respondents Jimmie Lynn Martin, Brent Martin and William Singleton. (*See* App. A at 90). The Supreme Court of Texas denial of writ exhausted Petitioners' State appellate remedies but left intact the improper holding of the Court of Appeals. Petitioners request that this Court correct this matter by granting their Petition.

The parental immunity doctrine, as applied by the trial court and affirmed by the Court of Appeals, is a complete bar to Katherine Singleton's right of redress against not only her mother, Jimmie Lynn Martin, but also her step-father, Brent

Martin and non-custodial father, William Singleton, III, deceased. This bar results in a denial of equal protection and due process guarantees under the Fourteenth Amendment. As Justice Burgess noted in his dissent below in the instant cause:

> Within the class of parents, those accused of vehicular torts are treated differently than those accused of non-vehicular torts. This distinction bears no rational relation to legitimate state interest... The negligent actions alleged arise not only from failing to educate the child in proper motorcycle safety, but also in failing to provide safety equipment. The tort where the parent negligently operates the vehicle and the tort where the parent negligently fails to provide safe equipment for operating a motorcyle can be distinguished only in ways not expressible as a legitimate state interest.

Appendix A at 912-13.

Also, within the class of injured persons, those injured by the negligence of parents and even non-custodial parents *and* step-parents, are treated differently than those injured by the negligence of other

parties. There is no rational relationship to this type of classification. The disparate classification inherent in the parental immunity doctrine was recognized by Texas Supreme Court Justice Mauzy: "To allow a recovery here to all relatives, friends or acquaintances, but not to [one's] own children would be a denial of the children's right to legal redress." *Jilani By And Through Jilani v. Jilani*, 767 S.W.2d 671, 675 (Tex. 1988) (concurring opinion).

The fear of family disharmony and collusive lawsuits has been consistently discounted. Eclavea, *Liability of Parent for Injury To Unemancipated Child Caused by Parent's Negligence - Modern Cases*, 6 A.L.R.4th 1066, 1114 (1981); *accord, Black v. Solmitz*, 409 A.2d 634 (Me. 1979); *Peterson v. Honolulu*, 462 P.2d 1007 (Haw. 1969); *Briere v. Briere*, 107 N.H. 432, 224 A.2d 588 (1966); *Falco v. Pados*, 282 A.2d 351 (Pa. 1971); *Streenz v. Streenz*, 106 Ariz. 86, 471

P.2d 282 (1970). No less than twenty-six states have totally or partially abrogated the parental immunity doctrine. 6 ALR4th at 1114-15 and 6 ALR4th (Supplement 1993) at 106-109 (including Alaska, Arizona, California, Florida, Georgia, Iowa, Hawaii, Indiana, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Oregon, Pennsylvania, South Carolina, Texas, Vermont and Wisconsin). While most of these cases were not expressly decided on a consitutional basis, the reasoning of each court discounted a rational basis for application of the parental immunity doctrine under each fact situation. These reasons include:

1. the universal existence of liability insurance. *Ard v. Ard*, 414 So.2d 1066 (Fla. 1982); *Streenz v. Streenz*, 471 P.2d 282 (Ariz. 1970); *Sorenson v. Sorenson*, 339 N.E.2d 907 (Mass. 1975);

2. the fundamental doctrine of compensation for injuries - public policy compels liability, not immunity. *Gibson v.*

Gibson, 479 P.2d 648 (Cal. 1971);

3. at common law there was no rule of immunity and the "family disharmony" argument has no merit. *Black v. Solmitz*, 409 A.2d 634 (Me. 1979); *Briere v. Briere*, 107 N.H. 432, 224 A.2d 588 (1966); *Peterson v. Honolulu*, 462 P.2d 1007 (Haw. 1969);

4. immunity does not serve the interests of justice and fairness to all concerned. *Plumley v. Klein*, 199 N.W.2d 169 (Mich. 1972);

5. the fear of fraudulent or collusive claims is not grounds to deny recovery. *Falco v. Pados*, 282 A.2d 351 (Pa. 1971); and

6. divorce of parents. *Buffalo v. Buffalo*, 441 N.E.2d 711 (Ind. App. 1982); *Turner v. Turner*, 304 N.W.2d 786 (Iowa 1981).

Even in Texas, when analyzing the inter-spousal immunity doctrine, the Supreme Court stated:

> To leave in place a bar of suits like that of [a spouse] or other suits involving non-vehicular torts would amount to a repudiation of the constitutional guarantee of equal protection of the laws. Tex. Const. Ann. Art. I, §3. This we will not do.
>
> Our result today is compelled by the fundamental proposition of public policy that the Court should afford redress for a wrong, and the

> failure of the rationale supporting the doctrine to withstand scrutiny.

Price v. Price, 732 S.W.2d 316, 320 (Tex. 1987).

Similarly, in Illinois, the Seventh Circuit held that the state statute imposing inter-spousal tort immunity was an unconstitutional denial of equal protection since it was not rationally related to the purpose of maintaining marital harmony. *Moran v. Beyer*, 734 F.2d 1245 (7th Cir. 1984). The Third Circuit held that the common law of New Jersey is within the scope of the equal protection clause of the Fourteenth Amendment. *In re Asbestos Litigation*, 829 F.2d 1233 (3rd Cir. 1987), cert. denied 485 U.S. 1029.

Although it is clear that the parental immunity doctrine is not rationally related to a legitimate state purpose, Petitioners urge the Court to adopt the more exacting standard of "strict-scrutiny." The right to bring a civil action for personal injuries is

a fundamental right, and a statutory law that affects this right is subject to strict-scrutiny analysis. *White v. State*, 203 Mont. 364, 661 P.2d 1272 (1983). This Court has held that the right and opportunity to be heard is fundamental to due process. *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Schroeder v. New York City*, 371 U.S. 208 (1962). Petitioners urge this Court to hold that Katherine Singleton's right of redress is a fundamental right that cannot be abrogated absent strict-scrutiny of the parental immunity doctrine.

When strictly scrutinized, the parental immunity doctrine clearly fails to pass constitutional muster. As noted by Justice Burgess in his dissent below, the doctrine fails to meet any of the purported objectives (App. A at 912). This conclusion comports with the judicial decisions of some twenty-seven states (*see*, 6 ALR4th *supra*, at 1114) and the criticism of the doctrine provided in

numerous scholarly articles. *See* RESTATEMENT (SECOND) OF TORTS § 895G, cmt. i. (1977); 2 FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, THE LAW OF TORTS § 8.11 (2nd ed. 1986); McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030 (1930); Comment, *Parent-Child Torts in Texas and the Reasonable Prudent Parent Standard*, 40 BAYLOR L. REV. 113 (1988); McLeod, Note, *Jilani v. Jilani: The Erosion of the Parental Tort Immunity Doctrine in Texas*, 28 Hous. L. Rev. 717 (1991).

Another reason that the standard of review in this case should be higher than the "rational relationship" standard is because of the status of Katherine Singleton. It is undisputed, as part of the summary judgment evidence, that, while a minor, she suffered a severe head injury from the occurrence in question that resulted in permanent brain impairment (*see*, Tr., Vol. III, 29, p. 2). Because of her permanent impairment and

disability, as well as her age at the time of the injury, she should be subject to intermediate analysis protection. *See, Catlin v. Ambach,* 644 F.Supp. 161 (N.D. N.Y. 1986) (application of the New York residency statute adversely affected a handicapped child's education, subjecting the child to intermediate protection of furthering a substantial goal of the state). For the reasons stated earlier, the parental immunity doctrine does not further any substantial goals of the State of Texas and therefore should be declared unconstitutional.

Even if this case is analyzed purely by the rational relationship standard, however, the parental immunity doctrine fails to provide a reasonable, and not arbitrary, classification restricting access to the courts that has a fair and substantial relationship to the object of the doctrine. *See, generally, Manes v. Coldin,* 400 F. Supp. 23 (N.Y. 1975), affirmed 423 U.S. 1068. The

doctrine imposes an arbitrary classification based on a parental (and even step-parent) relationship that fails to meet the purported objective of maintaining family harmony.

Moreover, the due process clause of the Fourteenth Amendment is adversely impacted by the parental immunity doctrine as applied in Texas. "[T]he right to be heard" is "one of the most fundamental requisites of due process." *Schroeder, supra* at 212. "A fundamental requirement of due process is the opportunity to be heard." *Armstrong, supra* at 552 (citing *Grannis v. Ordan,* 234 U.S. 385, 394). Having made access to the courts in Texas an entitlement, the state may not deprive a person of that access unless the balance of state and private interests favors the government. *Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982). The Second Circuit has held that the right of access to the courts is a substantive right, rather than merely procedural, and its exercise can be

shaped and guided by the state but cannot be obstructed, regardless of the procedural means used. *Morello v. James*, 810 F.2d 344 (2nd Cir. 1987). The right of access to the courts is a clear protection of a person's physical access to the court. *Crowder v. Sinyard*, 884 F.2d 804 (5th Cir. 1989), cert. denied 496 U.S. 924.

The injustice of the parental immunity doctrine is particularly highlighted in the instant cause. Katherine Singleton was catastrophically injured while a minor and is permanently disabled. Her damages should be compensated by those responsible. Her mother and step-father had purchased a motor scooter for her to ride on the public roads but failed to purchase a helmet. No instructions were given to wear a helmet. *See*, Tr., Vol. III, 29, Affidavit of Jimmie Lynn Martin, pp. 3-4 and deposition of Jimmie Lynn Martin at pp. 10-11). Katherine had permission to ride the motorcycle in question (*Id.*, Affidavit of

Jimmie Lynn Martin at 3-4).

The mere fact that Jimmie Lynn Martin is also Katherine Singleton's mother should not insulate her from liability. Certainly there is an absence of a rational relationship between this type of classification and the objectives of the parental immunity doctrine. The objective of maintaining family harmony is no longer valid when there is liability insurance, such as in this case. *See*, 6 ALR4th, *supra* at 1107-1111, 6 ALR (Supp. 1993) at 108. In fact, family harmony is disrupted when the doctrine is applied where there are catastropic medical costs and otherwise available insurance. *See, e.g., Jilani, supra,* at 674 (concurring opinion); *Sorenson v. Sorenson,* 369 Mass. 350, 339 N.E.2d 907 (1975). Thus, the objectives of the doctrine are not met, and may indeed be undermined, when applied under facts such as the case at bar.

If the parental immunity doctrine fails

to meet its objectives when applied to protect Jimmie Lynn Martin, it certainly fails when applied to Brent Martin, a step-father. Several courts have refused to extend the parental immunity doctrine to adoptive parents, grandparents and step-parents. *Gulledge v. Gulledge*, 367 N.E.2d 429 (Ill. App. 1977); *Rayburne v. Moore*, 241 So.2d 675 (Miss. 1970); *Wilkins v. Kane*, 181 A.2d 417 (N.J. Super. 1962); *Burdick v. Nawrocki*, 154 A.2d 242 (Conn. 1959); *Cwik v. Zylstra*, 155 A.2d 277 (N.J. Super. 1959); *Brown v. Cole*, 129 S.W.2d 245 (Ark. 1939); *Xaphes v. Mossey*, 224 F.Supp. 578 (D.C. Vt. 1963). These cases realize that even if the parental immunity doctrine exists it does not bar a suit against a non-parent, such as Brent Martin.

The doctrine also fails to meet its objectives as to the non-custodial father

William Singleton, III, deceased.[2] The cases have held that "a parent who did not have the custody of his unemancipated child at the time the tort occurred was not immune from suit in tort by the child." 6 ALR4th at 1111; *accord, Boundurant v. Boundurant*, 386 So.2d 705 (La. App. 1980); *Fugate v. Fugate*, 582 S.W.2d 663 (Mo. 1979).

As held by the above cases, "where the mother and father have been divorced, the parent who does not have the primary, general custody of the unemancipated minor child at the time the tort occurs" is not immune from suit. 6 ALR4th at 1111. The family in its traditional sense has already been disrupted

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[2]Brent Martin died on June 3, 1992, several months after the case was appealed to the Ninth Court of Appeals (the brief was filed February 14, 1992). Petitioners filed a Motion For Leave to include the death certificate as part of the record. The Court did not take any action on this Motion (see App. C). The Texas Supreme Court overruled a second Motion on this issue when writ was denied (*see* App. D). The death of the parent vitiates the rationale of the parental immunity doctrine. 6 ALR 4th at 1096-1099; Yates v. Lowe, 179 Ga. App. 888, 348 S.E.2d 113 (1986) (applying Fla. law). The death of Brent Martin provides another reason why certiorari should be granted.

through divorce and since "immunity from suit in tort deprives an injured party of a particular remedy [it] therefore should not be extended... ." *Id.* at 1112. Thus, the parental immunity doctrine should be declared unconstitutional as applied to William Singleton, III, deceased.

CONCLUSION

The denial of Katherine Singleton's right of redress against her tortfeasors is a denial of equal protection and due process. Accordingly, this Court should hold the parental immunity doctrine of Texas unconstitutional on its face or as applied in the case at bar.

The Petition For Writ of Certiorari should be granted.

Respectfully submitted,

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January 24, 1994

APPENDICES

APPENDIX "A"

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-92-009 CV

WILLIAM E. HALL, as next friend of KATHERINE SINGLETON and KATHERINE SINGLETON, Appellants

v.

JIMMIE LYNN MARTIN, BRENT MARTIN, and WILLIAM SINGLETON, III, Appellees

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Appealed from the 221st District Court
Montgomery County, Texas
Trial Cause No. 91-12-04068 CV

OPINION

This is a summary judgment appeal. Fourteen-year-old Katherine Singleton was injured on June 2, 1987, in a motorcycle **[851 S.W.2d at 906]** accident. Suit was brought against the motorcycle operator and others. The court appointed the Hon. William E. Hall to represent Katherine as next friend. Hall filed a negligence and gross negligence suit against Katherine's mother and managing conservator Jimmie Lynn Martin, step-father

Brent Martin, and father and possessory conservator William Singleton, III. These defendants filed seperate motions for summary judgment which were granted by the trial court and severed from the original suit into the suit now on appeal.

Appellants raise three points of error.

The points of error read as follows:

> Point of Error One: Due to the existence of material fact issues, the trial court erred in granting summary judgment as to Jimmie Lynn Martin.
>
> Point of Error Two: Due to the existence of material fact issues, the trial court erred in granting summary judgment as to Brent Martin.
>
> Point of Error Three: Due to the existence of material fact issues, the trial court erred in granting summary judgment as to William Singleton, III.

Chronicle of Events

On June 2, 1987, Katherine Singleton, who was fourteen years of age at the time, was a rider on a motorcycle being operated by James Hicks. She was not wearing a helmet when Mr. Hicks lost control of the motorcycle and the motorcycle crashed. Katherine Singleton was

severely injured. At that time, appellee Jimmie Lynn Martin, the mother of Katherine, and Brent Martin, the step-father, owned a moped scooter that was regularly ridden by the appellant, Katherine Singleton.

Upon meeting Hicks in the neighborhood, she decided to ride on his motorcycle with him. On that day Katherine Singleton had her mother's limited permission to ride the moped around the neighborhood to solicit contributions for a school fund-raising activity. Katherine was told to stay within her neighborhood. Ms. Martin did not give Katherine permission to ride with James Hicks on his motorcycle.

Jimmie Lynn Martin is the natural mother of the minor, Katherine Singleton. At the time of the accident, Katherine resided with her mother, Jimmie Lynn Martin. Ms. Martin was returning from work at approximately 4:45 p.m. on June 2, 1987, when she discovered that Katherine had been involved in a motorcycle accident.

Jimmie Lynn Martin and William Singleton, III, were divorced in April of 1982 in Harris County. Mr. Singleton was granted visitation rights as possessory conservator. At the time of the accident Mr. Singleton did not have custody or control of his minor daughter. Mr. Singleton did not learn of the accident until his daughter was at the hospital.

As for Mr. Brent Martin, appellant's step-father, he received Singleton into his home and held her out as a member of his family. Brent Martin had assumed the care and support of Katherine since February 19, 1983. Brent Martin has never adopted Katherine and has never been appointed her conservator. On June 2, 1987, the day of the accident, Brent Martin did not have knowledge of Katherine riding a motorcycle. At no time did he ever give Katherine permission to ride a motorcycle. Mr. Martin had no personal knowledge of this accident or the events leading to the accident until he was informed that Katherine was injured and was in the

hospital.

Procedural History

This suit was originally brought by Jimmie Lynn Martin, individually, and as next friend of Katherine Singleton, in cause no. 87-06-02110-CV in the 221st District Court of Montgomery County, against the motorcycle operator, James Richard Hicks, a minor, through his natural guardian, his mother Karen Hicks, for negligence and gross negligence. Additionally, a claim under the Texas Tort Claims Act was filed against Montgomery County for defective road conditions. James Hicks, Karen Hicks, and Montgomery County sued the appellee Jimmie Lynn Martin for negligence.

Suit was thereafter brought by the attorney ad litem, William Hall, as next friend [at 907] to Katherine, against Jimmie Lynn Martin for negligence. Later, Mr. Hall amended the original petition to include Brent Martin, the appellant's step-father, and William Singleton, III, the appellant's natural father, alleging negligence against

them. The appellees, Jimmie Lynn Martin, Brent Martin and William Singleton, III, each filed separate motions for summary judgment, as to the claims brought by the appellant Katherine. The trial court granted their summary judgment motions. The trial court granted severance from the remaining claims.

The Appellants' Argument

Appellants contend that Brent Martin, Jimmie Lynn Martin, and William Singleton, were all negligent in (1) purchasing a moped motor scooter; (2) entrusting a moped motor scooter to appellant without proper instructions, training and safety equipment; (3) failing to purchase a helmet for the moped motor scooter; (4) breaching a duty to exercise care that a person who has a special relationship to a child must exercise in order to protect the child from unreasonable risk of injury; (5) undertaking an act and violating the duty to act with reasonable care; (6) failing to provide protective headgear or helmet and in failing to instruct, train and

require appellant to wear protective headgear when the appellees knew or should have known that Katherine would and might ride the moped, and/or other motor bikes and the injuries to Katherine might or would occur in the event no helmet was worn; (7) allowing Katherine to operate or ride on a motor scooter or motorcycle without proper instruction, training, protective headgear or a helmet; and (8) that the appellees were negligent per se in failing to purchase the required protective headgear or a helmet.

Appellees contend that there was no cause of action against them. Appellees stated they did not breach a duty or cause the accident because of the fact that they all were protectively covered under the doctrine of parental immunity and that they had no duty and breached no duty, and the accident was not the proximate cause of any act or conduct on their part. We agree.

The Standard of Review

The motion for summary judgment and

supporting evidence must show that the movant is entitled to judgment as a matter of law. *McFadden v. American United Life Ins. Co.*, 658 S.W.2d 147 (Tex. 1983). The basic question on appeal from a summary judgment granted to a defendant is not whether the summary judgment proof raises fact issues related to the essential elements of a plaintiff's claim or cause of action but whether the summary judgment proof establishes as a matter of law that there is no genuine issue of a material fact because one or more of the essential elements of the plaintiff's cause of action have been negated. *Gibbs v. General Motors Corporation*, 450 S.W.2d 827 (Tex. 1970).

In reviewing a summary judgment, appellate courts should follow these standards: (1) that the movant has the burden to show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law; (2) in deciding whether there is a disputed material fact issue precluding summary judgment, the

court takes as true the evidence favorable to the nonmovant, and (3) every reasonable inference is indulged in favor of a nonmovant and all doubts are resolved in the nonmovant's favor. *See Nixon v. Mr. Property Management*, 690 S.W.2d 546 (Tex. 1985).

Issues not expressly presented to the trial court by written motion or response to the motion for summary judgment cannot be considered on appeal as grounds for reversal. *See City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671 (Tex. 1979). This Court may not raise grounds for reversal *sua sponte*. *San Jacinto River Authority v. Duke*, 783 S.W.2d 209 (Tex. 1990). When an order granting summary judgment does not state the specific ground on which it was granted, the summary judgment should be affirmed if any ground is sufficiently proved. *See Woomer v. City of Galveston*, 765 [at 908] S.W.2d 836 (Tex. App. - Houston [1st Dist.] 1988, writ denied).

The Arguments for Jimmie Lynn Martin

Ms. Martin contends that there is no genuine issue as to any material fact, therefore, she was entitled to summary judgment as a matter of law against appellants. She bases her contentions on the rule that (1) the plaintiff is not entitled to sue her based on the Texas Supreme Court's ruling that the doctrine of parental immunity exists in Texas and is the current law and (2) that Katherine has failed as a matter of law to state a cause of action for negligence against Jimmie Lynn Martin. Also, Katherine has failed to demonstrate a breach of duty or an exception to the Texas doctrine of parental immunity.

Parental immunity is the law in Texas. *See Jilani By and Through Jilani v. Jilani*, 767 S.W.2d 671 (Tex. 1988); *Felderhoff v. Felderhoff*, 473 S.W.2d 928 (Tex. 1971). The parental immunity doctrine is designed for the protection of family peace and tranquility and the parental right to discipline, control and

care of children. The courts in Texas have held that to allow litigation between parents and a child would be an adverse, unwarranted intrusion into the family circle. Texas, however, has carved out three exceptions to the parental immunity doctrine. The three are:

1. Parental immunity does not apply when a parent commits a wilful, malicious, or intentional wrong against a child or abandons or abdicates his parental responsibility and thereby subjects himself or herself to liability.

2. Texas does not apply the parental immunity doctrine when the act complained of arises outside of a normal family relationship of a parent to a child, such as a business activity in which the child is the employee and the parent is the employer.

3. The third exception to the parental immunity doctrine allows a child to recover against a negligent parent for damages caused by the negligent parent in operating a motor vehicle.

The appellant Katherine's cause of action does not fall within any of the three exceptions to the parental immunity doctrine. Therefore, this salutary doctrine protects the appellee Jimmie Lynn Martin under this record.

Parental immunity applies with respect to alleged acts of ordinary negligence which involve a reasonable exercise of parental authority or the exercise of ordinary parental discretion. The Court in *Felderhoff, supra* stated at page 933 that:

> [P]eace, tranquility and discipline in the home are endowed and inspired by higher authority than statutory enactments and court decisions. Harmonious family relationships depend on filial and parental love and respect which can neither be created nor preserved by legislatures or courts. The most we can do is to prevent the judicial system from being used to disrupt the wide sphere of reasonable discretion which is necessary in order for parents to properly exercise their responsibility to provide nurture, care, and discipline for their children. These parental duties, which usually include the provision of a home, food, schooling, family chores, medical care, and recreation, could be seriously impaired and retarded if parents were to be held liable to lawsuits by their unemancipated minor children for unintentional errors or ordinary negligence occurring while in the discharge of such parental duties and responsibilities. It is in this sphere of family relations between parent and child that the rule of immunity from litigation continues to find justification and validity.

In *Jilani, supra,* the Texas Supreme Court interpreted the scope of the parental immunity doctrine as it relates to (1) the reasonable exercise of parental authority and (2) the exercise of ordinary parental discretion. The Supreme Court recognized that reasonable parental discretion still needed protection. The Court went on to say that *Jilani* limited parental immunity to those "transactions that are essentially parental." *Id.* 767 at 673. The Court held that operating a motor vehicle **[at 909]** in which the minor child was riding was not an essential parental activity.

Katherine's factual contentions, we think, fall within the scope of the reasonable exercise of parental authority and ordinary parental discretion. We affirm the judgment favorable to Jimmie Lynn. By like reasoning the judgments favorable to Brent Martin and William Singleton, III are affirmed. The parental immunity doctrine validly and realistically protects the family including Brent and william. Of paramount importance is

the protection and nurturing of the parent-child relationship. A recent case has reaffirmed that a child has no cause of action against a parent for injuries arising out of deficient supervision. *See Fogel, Ltd., A.T. v. Shoemake,* 795 S.W.2d 903 (Tex. App. - Fort Worth 1990), *rev'd on other grounds, Shoemake v. Fogel, Ltd.,* 826 S.W.2d 933 (Tex. 1992).

In *Shoemake,* the Supreme Court held that the right of an unemancipated minor to bring a tort action against her parent is restricted and proscribed by the parental immunity doctrine and the purpose of this doctrine is to prevent the court system from being employed to disrupt the broad sphere of discretion. This discretion is necessary in order for parents to properly exercise their responsibility to provide nurture, care and discipline for their children. The Supreme Court wrote:

> [W]e adhered to the view that a parent retains immunity as to "alledged acts of ordinary negligence which involve a reasonable exercise of parental

> authority or the exercise of ordinary parental discretion with respect to the provisions for the care and necessities of the child."

Id., 826 at 935-936.

The Insurance Issue

The appellants raised a contention and issue about the fact that Katherine's mother had insurance coverage. It must be clearly understood that liability insurance is not relevant upon the issue of whether a parent acted negligently. Evidence that a parent was or was not insured against liability is not admissible upon the issue of whether he or she acted negligently. TEX. R. CIV. EVID. 411. TEX. R. CIV. P. 38(c) disallows the joinder of liability or indemnity insurance companies from tort cases unless the company is liable by statute or contract to the person injured or damaged. Here liability insurance cannot create a legal duty. Liability insurance cannot vitiate the parental immunity doctrine.

The Constitutionality of the Parental Immunity Doctrine

The appellants assert that the parental immunity doctrine should be considered unconstitutional as a matter of law under this record. The cases relied upon by appellants are authorities from other jurisdictions. We conclude the question of constitutionality is not longer in doubt.

The Negligence Issue

As a separate, distinct and independent basis for our affirmance of the judgments below, we conclude that the movants have negated the issues of negligence and proximate cause.

The common law duty of negligence consists of three essential elements: (1) a legal duty owed by one person to another; (2) a breach of that duty; and (3) damages approximately resulting from the breach. In order for a plaintiff to recover on the negligence issue, he must first prove that a duty exists and the violation of the duty owed

to him by the defendant. The Texas Supreme Court has defined "duty" as:

> [I]f a party negligently creates a dangerous situation it then beomes his duty to do something about it to prevent injury to others if it reasonably appears or should appear to him that others in the exercise of their lawful rights may be injured thereby.

Buchanan v. Rose, 138 Tex. 390, 159 S.W.2d 109 (1942).

It is important to note that in Texas an unemancipated minor may not sue his parents for damages based on ordinary negligence involving parental functions. This doctrine encompasses those alleged [at 910] acts of ordinary negligence which involve a reasonable exercise of parental authority or the exercise of ordinary parental discretion with respect to the provisions for the care and necessities of the child.

In the case at bar, Ms. Martin did not negligently create the situation which led to the accident involving her minor daughter. Ms. Martin was unaware that her daughter was riding Hick's motorcycle prior to the

accident. Katherine was permitted to ride the moped. Neither of the first two elements of a negligence cause of action exist. The same reasoning applies to William and Brent. Therefore, Ms. Martin, William and Brent cannot be held liable on the theory of negligence.

The question of duty is a question of law. The appellant attempts to assert that her mother had a duty to provide safety equipment, training or instruction because Ms. Martin purchased a moped and allowed her daughter to ride it. We find that there is no negligence in the benevolence of parents toward their child. Purchasing a moped did not negligently create the situation in which Katherine was injured. The "special duty of care" cited by appellants in their brief of the parents' duty to others for the negligent acts of their child is misleading. Their argument is skewed. *See* RESTATEMENT (SECOND) OF TORTS § 316 (1965), which states:

A parent is under a duty to exercise

> *reasonable care so to control his* minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent
>
> (a) knows or has reason to know that he has the ability to control his child, and
>
> (b) knows or should know of the necissity and opportunity for exercising such control.

This "special duty of care" only applies to the parent's control of the child's conduct as it relates to others. In the case at bar there was no special duty of care because the conduct involved did not involve others. Katherine is not "others"; she is the appellant.

The Proximate Cause Issue

Before a cause of action for negligence can exist, a third element must be present. There must be a finding of proximate cause before there can be a recovery from the negligent person. Proximate cause in Texas consists of two concepts: (1) cause in fact, and (2) foreseeability. These basic elements

must be present. *See Farley v. M & M Cattle Co.*, 529 S.W.2d 751 (Tex. 1975). Cause in fact means the act or omission was a substantial factor in bringing about the injury without which no harm would have occurred.

As for the second basic element of proximate cause, foreseeability, the law requires that a person of ordinary prudence (using ordinary care) should have anticipated the damages to others caused by his negligent act. *See Clark v. Waggoner*, 452 S.W.2d 437 (Tex. 1970). Ms. Martin could not have reasonably foreseen that her minor daughter would be riding on Hicks' motorcycle. Ms. Martin's daughter did ask for her permission to ride the moped, which was granted upon the condition she only ride in the neighborhood subdivision. The record negates proximate cause as to each appelle.

In brief, pragmatic summary, Katherine's mother instructed her to use the moped in her residential neighborhood to raise money for a

school project. Katherine disregarded her mother's instructions; she disobeyed her parent in the sense. Katherine's failure to heed her mother's instructions, we conclude, does not explode - does not emasculate - the parental immunity doctrine.

The judgments below are affirmed.

AFFIRMED.

JACK BROOKSHIRE JUSTICE

Opinion Delivered
March 25, 1993
Publish

Before Walker, C.J., Brookshire and Burgess, JJ.

DISSENTING OPINION

I respectfully dissent. Crucial to the determination of all three points of error is appellants' constitutional challenge to the doctrine of parental immunity. Appellees claim Katherine's cause of action is barred by the doctrine of parental immunity. There was no bar to a suit against a parent at common law until the doctrine was created [at 911] by

judicial fiat in 1891 by *Hewellette v. George*, 68 Miss. 703, 9 So. 885 (1891). Texas recognized the doctrine for the first time in 1948. *Garza v. Garza*, 209 S.W.2d 1012, 1014 (Tex. Civ. App. - Eastland 1948, no writ). Although Katherine's cause of action did not accrue until 1987, the courts impose parental immunity upon her cause of action for negligence. Katherine argues that such a restriction is prohibited by the equal protection clause of the Texas Constitution. TEX. CONST. art. I § 3. I agree. The parental immunity doctrine has survived challenge on the basis of public policy. *Shoemake v. Fogel, Ltd.*, 826 S.W.2d 933, 935 (Tex. 1992); *Jilani v. Jilani*, 767 S.W.2d 671, 672 (Tex. 1988); *Felderhoff v. Felderhoff*, 473 S.W.2d 928, 933 (Tex. 1971). In approving the public policy objectives of the doctrine without addressing any constitutional issues, the Texas Supreme Court rejected the criticism of a number of scholarly articles. *See* RESTATEMENT (SECOND) OF TORTS § 895G cmt. i.

(1977); Romualdo P. Eclavea, *Liability of Parent for Injury to Unemancipated Child Caused by Parent's Negligence - Modern Cases*, 6 A.L.R. 4th 1066 (1981); 2 FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, THE LAW OF TORTS § 8.11 (2nd ed. 1986); William E. McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030 (1930); Comment, *Parent-Child Torts in Texas and the Reasonable Prudent Parent Standard*, 40 BAYLOR L. REV. 113 (1988); Chanse McLeod, Note, *Jilani v. Jilani: The Erosion of the Parental Tort Immunity Doctrine in Texas*, *28* HOUS. L. REV. 717 (1991).

Shoemake, *Jilani* and *Felderhoff* partially abrogated the doctrine of parental immunity. Parents can no longer claim immunity in suits for negligence arising in the course of the parent's business activities, *Felderhoff*, 473 S.W.2d at 933 or involving a motor vehicle, *Jilani*, 767 S.W.2d at 673. *Shoemake* rejected the family harmony policy argument in support of immunity, but upheld the doctrine on the

basis of avoiding undue judicial interference. In *Shoemake*, the supreme court recognized that *Price v. Price*, 732 S.W.2d 316 (Tex. 1987), abolished the doctrine of spousal immunity for all purposes, but held that in addition to the inadequate justification of protection of family harmony rejected by *Price*, the parental immunity doctrine avoids undue judicial interference with parental discretion. *Shoemake*, 826 S.W.2d at 936. *Shoemake* did not address that part of *Price* which held that the Texas equal protection clause required the doctrine be abolished for both vehicular and non-vehicular torts, and there is no indication in *Shoemake*, *Jilani* and *Felderhoff* that the parties raised an equal protection argument.

Equal protection means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. TEX. CONST. art. I § 3 interp. commentary (Vernon 1984). The doctrine of parental immunity treats parents different

from all other tortfeasors. Distinction classification is not repugnant to the constitution so long as there is a reasonable basis for the distinction and the law operates equally on all members of the class. *Inman v. Railroad Comm'n,* 478 S.W.2d 124 (Tex. Civ. App. - 1972, writ ref'd n.r.e.); *Creps v. Board of Fireman's Relief and Retirement Fund Trustees of Amarillo,* 456 S.W.2d 434, 438 (Tex. Civ. App. - Amarillo 1970, writ ref'd n.r.e.). Within the class of parents, those accused of vehicular torts are treated differently than those accused of non-vehicular torts. This distinction bears no rational relation to legitimate state interest. There are recognized public policy obejctives for parental immunity in actions arising out of the discharge of parental responsibilities "such as the provision of a home, food and schooling". *Shoemake,* 826 S.W.2d at 936. I believe that, as applied in this case, the doctrine of parental immunity denied Katherine Singleton equal protection of

the law. The negligent actions alleged arise not only from failing to educate the child in proper motorcycle safety, but also in failing to provide safety equipment. The tort where the parent negligently operates the vehicle and the tort where the parent negligently fails to provide safe equipment for operating a motorcycle can be distinguished only in ways not [at 912] expressible as a legitimate state interest. Although in the course of rearing their children parents perform many discretionary acts which may be criticized by others, use of motorcycles by unlicensed minors without safety equipment cannot be said to be an act purely an uniquely within the realm of the family. Because the doctrine of parental immunity conflicts with the Texas Constitution, it should not be applied in this case to bar suit as a matter of law.

As to whether appellants failed as a matter of law to state a cause of action against the individual appellees, a cause of action for negligence consists of: (1) a legal

duty owed by one person to another; (2) a breach of that duty; and (3) damages proximately resulting from the breach. *El Chico Corp v. Poole*, 732 S.W.2d 306, 311 (Tex. 1987).

Duty is a question of law. *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990). Appellants urge the appellees failed to establish no duty was owed Katherine. Jimmie Martin testified by deposition they purchased a moped for Katherine, they did not have a helmet for her, and Katherine had her express permission to ride the moped that day. Jimmie Martin's affidavit states: "On the day my daughter was injured, I gave her express permission to ride her moped...[s]he had my implied permission to ride a motorcycle as well, which she was doing on the day of the accident." Katherine's step-father, Brent Martin, argues that in the event parental immunity is not available, he has no duty of care towards Katherine. Brent admitted in his affidavit that he "assumed the

care and support of" Katherine. Jimmie Martin's affidavit and deposition aver that she and Brent Martin purchased the moped for her but did not provide a helmet; that Katherine's father, William Singleton, was aware that Katherine had a moped and rode it and other motorcycles without a helmet, told Katherine he never wore a helmet when he rode, and did not instruct her on safe operation of the vehicle. A person of ordinary prudence, having entrusted a motor-driven vehicle to a child, would have a duty to ensure the child had the necessary safety equipment. Each of the appellees were either a parent or a person who had assumed a parental role. *Motsenbocker v. Wyatt*, 369 S.W.2d 319, 324 (Tex. 1963), recognized a parental duty of supervision. *Motsenbocker* involved a five-year-old; Katherine was fourteen. The duty exists in either case. Whether that duty was breached by each of the appellees in this case is a question for the jury.

Appellees claim that the fact that

Katherine was not wearing a helmet and that no safety gear was provided for her by the appellees is not the proximate cause of the accident. Cause in fact means the act or omission was a substantial factor in bringing about the injury without which no harm would have occurred. *Nixon v. Mr. Property Management*, 690 S.W.2d 546 (Tex. 1985). It is particularly apt question for jury determination. *Farley v. MM Cattle Co.*, 529 S.W.2d 751, 756 (Tex. 1975). The accident may have occurred even if Katherine was not present at the scene, but appellants have alleged that but for the alleged acts of negligence by the appellees Katherine would not have been on the motorcycle, or she would have been wearing protective headgear. Appellees failed to establish that the alleged acts were not a cause in fact of Katherine's injuries. Appellees also argue that it was not foreseeable that Katherine would be riding the motorcycle involved in the accident. It is not required that the particular accident

complained of should have been foreseen; all that is required is that the injury be of such a general character as might reasonably have been anticipated and that the injured party be so situated with relation to the wrongful act that injury might reasonably have been anticipated. *Nixon*, 690 S.W.2d at 550. The affidavits attached to appellants' summary judgment response state that Jimmie Martin knew her daughter was riding a moped that day and knew she did not have a helmet. Martin failed to establish that it was not foreseeable that Katherine might be injured if she rode a moped, or a similar vehicle, without protective gear. *See Brown v. Edwards Transfer Co., Inc.*, 764 S.W.2d 220, 224 (Tex. [at 913] 1988). Brent Martin failed to establish a lack of proximate cause as a matter of law, given that he purchased the moped for Katherine, without a safety helmet, and knew she rode without protective gear. William Singleton also failed to establish a lack of proximate cause as a matter of law,

given that he rode with Katherine, told her he never wore a helmet, and did not instruct Katherine to wear protective gear.

The appellees failed to establish that there was no genuine issue of material fact and that they were entitled to judgment as a matter of law. TEX. R. CIV. P. 166a. The trial court erred in granting summary judgment for Jimmie Lynn Martin, Brent Martin, and William Singleton, III. Points of error one, two and three should be sustained and the judgment reversed and remanded to the trial court for trial on the merits. Because the majority holds otherwise, I respectfully dissent. [at 914]

DON BURGESS JUSTICE

Dissent Delivered
March 25, 1993
Publish

Before Walker, C.J., Brookshire and Burgess, JJ.

APPENDIX "B"

COURT OF APPEALS
NINTH DISTRICT OF THE STATE OF TEXAS
1001 Pearl, Suite 330
Beaumont, Texas 77701

Judgement entered March 25, 1993

William E. Hall, as next friend of Katherine Singleton and Katherine Singleton

v. No. 09 92 009 CV

Jimmie Lynn Martin, Brent Martin and William Singleton, III

Appealed from the 221st District Court of Montgomery County, Texas

Opinion by Justice Jack A. Brookshire

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there was no error in judgment; it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things affirmed and that all costs of the appeal be assessed against the appellants, William E. Hall, as next friend of Katherine Singleton and Katherine Singleton and the

sureties on the appeal bond, Universal Surety of America. A copy of this judgment shall be certified below for observance.

A true copy of the judgment, to be entered, I hereby certify.

----s------

Shirley Forrest
Clerk

APPENDIX "C"

COURT OF APPEALS
STATE OF TEXAS
NINTH DISTRICT

April 15, 1993

RE: CASE NO. 09-92-00009-CV
Trial Court No. 91-12-4068 CV

Style: Hall, William E. anf of Katherine Singleton v. Martin, Jimmie Lynn, et al

Dear Counsel:

The Appellant's Motion For Rehearing in the above styled and numbered cause was overruled this date.

No action will be taken on Appellant's Motion to Supplement the Record.

Sincerely,

Shirley Forrest,
Clerk

APPENDIX "D"

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

September 10, 1993

RE: Case No. D-3748

Style: WILLIAM E. HALL, as next friend of KATHERINE SINGLETON and KATHERINE SINGLETON v. JIMMIE LYNN MARTIN, BRENT MARTIN and WILLIAM SINGLETON

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, "Writ Denied." Petitioner's motion to supplement the record is overruled.

Sincerely,

John T. Adams, Clerk

by _____
Blanca Morin,
Deputy

APPENDIX "E"

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

October 27, 1993

RE: Case No. D-3748

Style: WILLIAM E. HALL as next friend of KATHERINE SINGLETON v. JIMMIE LYNN MARTIN, BRENT MARTIN and WILLIAM SINGLETON

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

JOHN T. ADAMS, CLERK

by:_____
Michael C. Murphey,
Deputy Clerk

(2)

Supreme Court, U.S.
FILED
MAR 16 1994
OFFICE OF THE CLERK

No. 93-1298

In The

Supreme Court of the United States

October Term, 1993

WILLIAM E. HALL, ET AL.,

Petitioners,

v.

JIMMIE LYNN MARTIN, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Texas

JIMMIE LYNN MARTIN, WILLIAM SINGLETON, III AND BRENT MARTIN'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners assert the following questions in their petition for writ:

1. Whether the Equal Protection Clause of the Fourteenth Amendment prevents application of the parental immunity doctrine to bar Petitioner Katherine Singleton's action for negligence against the non-adopting stepfather, mother and deceased father.

2. Whether the Due Process Clause of the Fourteenth Amendment prevents application of the parental immunity doctrine to bar Petitioners' action for negligence against her non-adopting stepfather, mother and deceased father.

Petitioners asserted these questions for the first time in their Motion for Rehearing in the Beaumont Court of Appeals. There was never any issue properly presented to or decided by the state courts regarding any federal constitutional right. Therefore, these questions are not properly presented here for the first time. Additionally, there are alternative, independent and adequate state grounds to support the state's judgment, therefore, this writ is improper and should be dismissed.

LIST OF PARTIES

Petitioners	**Attorneys of Record**
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Respondents	**Attorneys of Record**
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LIST OF PARTIES – Continued

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Other Persons Having an Interest:

KAREN HICKS, JAMES RICHARD HICKS (Defendants)	Mr. Ruben Hope Jr. RUBEN HOPE & ASSOCIATES P.O. Box 3188 Conroe, Texas 77305-3188 Telephone No.: (409) 539-7828
COUNTY OF MONTGOMERY (Defendants) –	M. Kaye Appelwhite 301 N. Main Street Conroe, Texas 77301 Telephone No.: (409) 539-7828
JAMES CHRISTOPHER HICKS (Defendants)	Mr. James Bournerges Lueders & Bournerges 9525 Katy Freeway, Suite 222 Houston, Texas 77024 Telephone No.: (713) 464-3383

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No. 93-1298

In The

Supreme Court of the United States

October Term, 1993

WILLIAM E. HALL, ET AL.,

Petitioners,

v.

JIMMIE LYNN MARTIN, ET AL.,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Texas

JIMMIE LYNN MARTIN, WILLIAM SINGLETON, III AND BRENT MARTIN'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

Respondents, Jimmie Lynn Martin, Brent Martin and William Singleton, III, respectfully file this Brief in Opposition to Petitioners' Writ of Certiorari and pray that the Supreme Court dismiss or in the alternative deny the Petition for Writ of Certiorari seeking review of the denial of the Writ of Error of the Supreme Court of Texas and the judgment of the Ninth Court of Appeals of the State of Texas at Beaumont.

STATEMENT OF THE CASE

The action underlying this appeal is a claim for damages for personal injuries sustained by Katherine Singleton (an unemancipated minor), as a result of a motorcycle accident in which Katherine Singleton was involved, on or about June 2, 1987. The trial court granted summary judgment in favor of Respondent, Jimmie Lynn Martin, on February 5, 1991, against Plaintiff, William E. Hall, Jr., a/n/f of Katherine Singleton, Counter-Plaintiffs, James Richard Hicks and Karen Hicks, and Counter-Plaintiff/Cross-Plaintiff Montgomery County. The trial court also granted Respondents Brent Martin and William Singleton, III's summary judgment motions. The causes of action against Respondents were severed and made final. Petitioners filed their appeal to the Court of Appeals, Ninth District of Texas at Beaumont. The Court of Appeals affirmed the judgments of the trial court. *Hall v. Martin*, 851 S.W.2d 905 (Tex. App. – Beaumont 1993, writ denied). The Texas Supreme Court denied Petitioners' Application for Writ of Error and this decision became final on October 27, 1993.

STATEMENT OF JURISDICTION

The Plaintiff has invoked Supreme Court Rule 10 which states:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate

> the character of reasons that will be considered: . . .
>
> > (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

For the Supreme Court to grant writ of certiorari there must be a federal question involved. Whether there is a federal question is the petitioner's burden of proof. *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62 (1947).

The United States Supreme Court lacks jurisdiction based upon affirmation of summary judgments on "adequate and independent state grounds". *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). In *Hall v. Martin*, 851 S.W.2d 905 (Tex. App. – Beaumont 1993, writ denied), the court affirmed the granting of summary judgments on two separate grounds; 1) the parental immunity doctrine and 2) negligence and proximate cause. The Court of Appeals specifically held "[a]s a separate, distinct and independent basis for our affirmance of the judgments below, we conclude that the movants have negated the issues of negligence and proximate cause." *Id.* at 910. The Court found that there was no legal duty owed to Katherine Singleton by her parents, Jimmie Lynn Martin, William Singleton, III and Brent Martin and therefore no breach of a duty. Furthermore, the court affirmed the granting of the summary judgments in finding no proximate cause. "The record negates proximate cause as to each appellee." *Id.* at 911.

Because the opinion in *Hall* rests upon "adequate and independent state grounds", the Petitioners' Writ is not reviewable by this Court. It is well settled law that writ

will not be granted where there are independent and adequate state grounds to support the judgment. The Court reconsidered this issue in *Sochor v. Florida*, 119 L.Ed.2d 326, 112 S.Ct. ___, 504 U.S. ___ (1992), in which the court stated that:

> this court lacks jurisdiction to review a state court's resolution of an issue of federal law if the state court's decision rests on an adequate, independent state ground . . . as it will if the state court's opinion indicates clearly and expressly that the state's ground is an alternative holding.

Id. at 337. This is only a restatement of the case law, which is well settled on this issue. *Herb v. Pitcairn*, 324 U.S. 117 (1944), *McCoy v. Shaw*, 277 U.S. 300 (1927), *Bell Telephone Co. of Pennsylvania v. Van Dyke*, 296 U.S. 533 (1935). The Texas state court's opinion can not even remotely be said to be grounded upon federal law. A thorough reading of the *Hall* opinion clearly shows adequate and independent state grounds for affirming the summary judgments. *Id.* at 910-911. *See also, Buchanan v. Rose*, 138 Tex. 390, 159 S.W.2d 109 (1942); *Farley v. M & M Cattle Co.*, 529 S.W.2d 751 (Tex. 1975) and *Clark v. Waggoner*, 452 S.W.2d 437 (Tex. 1970). Therefore, all federal constitutional arguments concerning the parental immunity doctrine are not reviewable by this Honorable Court. *Michigan v. Long*, 463 U.S. 1032 (1983). Based upon the foregoing, this Court should respectfully decline to consider this Writ of Certiorari.

In addition, the Petitioners fail to cite any cases that support their position that there are conflicting state and federal decisions. Petitioners merely restate the contents

of the United States Supreme Court Rule 10.1(b) and 10.1(c). Likewise, the invocation of this Court's jurisdiction based upon the importance of the constitutional question involved is inappropriate based on the "adequate and independent state grounds" that supported the decision below. *Michigan v. Long; Hall v. Martin.*

STATEMENT OF FACTS

Respondents, Jimmie Lynn Martin, Brent Martin and William Singleton, III, challenge Petitioners' Statement of Facts in its entirety because of its argumentative and exaggerated presentation, especially with respect to the nature of Katherine Singleton's injuries. Therefore, Respondents present the following Statement of Facts in addition to the chronicle of events as stated in the opinion in *Hall v. Martin.*

This is a personal injury negligence action arising from a motorcycle accident which occurred on or about June 2, 1987, in Montgomery County, Texas. (*See* Tr. Vol. II, #10, p. 185). Karen Hicks and James Richard Hicks were the owner and operator (respectively) of the Honda Hurricane Motorcycle involved in this accident. (*See* Tr. Vol. II, #10, pp. 186-187). Katherine Singleton was riding as a passenger on the Hicks motorcycle pursuant to a request from Katherine Singleton. During the motorcycle ride, Hicks lost control and/or was caused to lose control of his motorcycle resulting in the accident made the basis of this lawsuit. (*See* Tr. Vol. I, #10, pp. 186-187). As a result, Katherine Singleton sustained injuries. (*See* Tr. Vol. II, #10, pp. 249-250). At the time of the accident, Jimmie

Lynn Martin was unaware that her daughter would be riding a motorcycle. (*See* Tr. Vol. I, #3, p. 39).

Respondent, Jimmie Lynn Martin, is the natural mother of the minor, Katherine Singleton. William Singleton, III was Katherine's natural father and Brent Martin is Katherine's stepfather. At the time of the accident, Katherine Singleton resided with and was cared for by her mother, Jimmie Lynn Martin and stepfather, Brent Martin. (*See* Tr. Vol. II, #10, pp. 249-250). Respondent, Jimmie Lynn Martin was returning home from work at approximately 4:45 p.m., on June 2, 1987, when she discovered that her daughter had been involved in a motorcycle accident. Katherine Singleton was fourteen (14) years old at the time of the accident. (*See* Tr. Vol. II, #10, p. 241). Katherine Singleton had her mother's permission to ride her **mo-ped** in the neighborhood the day of the accident. (*See* Tr. Vol. II, #10, p. 208). Katherine Singleton did not ask for permission to ride Hicks' motorcycle. The Respondents take exception to the Petitioners unsubstantiated assertion that Katherine Singleton "sustained permanent brain impairment". Petitioners' writ at 16. There is no evidence in the record of the extent of Katherine Singleton's injuries.

Further, Jimmie Lynn Martin and William Singleton, III were divorced in April of 1982 in Harris County, and William Singleton, III was granted visitation and rights as the possessory conservator. (Tr. Vol. III at 384-85). At the time of the accident, William Singleton, III did not have custody or control of his minor daughter who was residing with her mother. (Tr. Vol. III at 386). Respondent, William Singleton, III, did not learn of the accident until his daughter was at the hospital. At no time relevant to

this lawsuit did he give the minor plaintiff instructions regarding the riding of a motorcycle, nor did he give her permission to ride with James Hicks on his motorcycle. (Tr. Vol. III at 346). At no time relevant to this lawsuit did William Singleton have custody, or the right to control, or supervise his daughter. William Singleton passed away on June 3, 1992 after this appeal was taken and judgment rendered.

Brent Martin, is the step-father of Katherine Singleton. (Tr. at 317, 389, 399). He received Katherine into his home and held her out as a member of his family. He assumed the care and support of Katherine on February 19, 1983. However, he never adopted Katherine and has never been appointed as her conservator. On June 2, 1987, nor on any other date, did Brent Martin have knowledge that Katherine was riding a motorcycle. At no time did he give Katherine permission to ride a motorcycle, nor did he have personal knowledge of this accident or the events leading to the accident until he was informed that Katherine was injured and in the hospital. (Tr. at 399-400).

PROCEDURAL HISTORY

All three respondents filed a motion for summary judgement based on the parental immunity doctrine, which applies in Texas, to allegations of negligence in the exercise of a parental role, and also on the basis that plaintiff could not establish as a matter of law, that the accident and injuries were proximately caused by any conduct or omission of any of the three respondents.

The trial court granted the motions for summary judgment. Thereafter, plaintiff severed these defendants from the case, and appealed the trial court's granting of the summary judgments in the Court of Appeals, Ninth District of Texas at Beaumont. The issues presented on appeal were that (1) the conduct of the defendants did not fall within the parameters of the parental immunity doctrine, (2) there were material issues as to whether or not defendants conduct was the proximate cause of the accident, and (3) that the parental immunity doctrine violated the Texas Constitution. Petitioners failed to state any federal question, and, in fact, do not even cite to either the Texas Constitution or the United States Constitution in their brief. The question of state constitutionality was raised in dicta and not as a main point of error.

The Beaumont Court of Appeals upheld the granting of the summary judgments for all three respondents on both grounds, holding that their conduct was immune from lawsuit because of the parental immunity doctrine, and further, that plaintiffs could not establish proximate cause as a matter of law. After Petitioners made a motion for rehearing, which was denied without an opinion, an Application for Writ of Error was filed in the Texas Supreme Court which was also denied without opinion.

WAIVER OF CONSTITUTIONAL CLAIMS

The Petitioners have failed to perfect their Federal Fourteenth Amendment arguments in the lower courts and therefore cannot raise them for the first time in this

Court. 28 U.S.C. § 1257. *See* Responses in Opposition to Motion for Summary Judgment of Respondents (Tr. Vol. III, #29, pp. 34-36). In examining this document, the Court will see that the Petitioners did not perfect the federal constitutional argument. The Petitioners did not address the Texas parental immunity doctrine's federal constitutionality. On appeal, the Petitioners tried to stretch the rationale in *Price v. Price*, 732 S.W.2d 316 (Tex. 1987) (inter-spousal immunity eliminated in tort personal injury actions), to encompass the parental immunity doctrine based upon *Price's* use of the Texas Constitution, Article I, Section 3, not the United States Constitution. (Tr. Vol. III, #29, p. 36). The Petitioners briefly mentioned that the parental immunity doctrine was unconstitutional on its face as applied in this case. The Petitioners, however, do not cite which constitution they seek to invoke or what provisions of either may apply. Furthermore, there are no constitutional cites specifically referred to in Petitioners' brief or table of authorities. The only clue as to which constitution Petitioners seek to invoke is their citation to *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988), in which the Texas Supreme Court answers a certified question from the Fifth Circuit regarding the application of the Texas Constitution to the statutory limitations on medical malpractice damages. The mere citation of *Lucas* does not invoke or perfect Petitioners' arguments presented to this court. *Webb v. Webb*, 451 U.S. 493 (1981) is illustrative of exactly the type of situation presented in this case. In *Webb*, this Court stated:

> This Court has frequently stated that when 'the highest state court has failed to pass upon a federal question, it will be assumed that the

> omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.'
>
> *Id.* at 495.

Further, a vague assertion to a constitutional principle will not preserve a due process argument in the Supreme Court. *Bankers Life and Casualty Co. v. Crenshaw,* 486 U.S. 71 (1988). A generic reference to the Fourteenth Amendment is not sufficient to preserve a constitutional claim based on an unidentified provision. *Taylor v. Illinois,* 484 U.S. 400 (1988).

Petitioners did address the Texas constitutional argument in their brief to the Appeals Court and it was dismissed because the case authority that Petitioners raised was that of other jurisdictions not controlling in Texas. The Beaumont Court of Appeals held "[w]e conclude the question of constitutionality is no longer in doubt." *Hall* at 910. The court did not address any United States Constitutional arguments as they where not properly raised by Petitioners. Furthermore, even the dissent recognized that Petitioners' argument was confined to the application of the equal protection clause of the Texas Constitution.

> "Katherine argues that such a restriction (parental immunity) is prohibited by the equal protection clause of the Texas Constitution."
>
> *Hall* at 912.

Under Texas law "[i]ssues not expressly presented to the trial court by written motion or response to the

motion for summary judgment cannot be considered on appeal as grounds for reversal." *Hall* at 908.

The law is clear as mandated by this Court that a federal question must be properly presented and considered by a state court before this Court will have jurisdiction to grant certiorari. Further, when the federal constitution is not specifically mentioned in the state's opinion or the Petitioner's brief, the court will conclusively presume that the state constitution was intended. *Osborne v. Clark*, 204 U.S. 565 (1960). Additionally, merely the averment in a petition for writ of error that a federal question was raised and decided in the state court is insufficient in itself to give the court jurisdiction. *Id.* at 565. The Court will not even consider a petition for writ of certiorari where the Petitioner failed to even reference a federal question in his brief to the state. *Gibbs v. Zimmerman*, 290 U.S. 326 (1933); *Chappell v. Bradshaw*, 128 U.S. 132 (1888).

The attempt of the Petitioners to raise a federal question for the first time on rehearing, as in this case, is too late. In *Herndon v. Georgia*, 295 U.S. 441 (1935), *rehearing denied*, 296 U.S. 661 (1935), dismissing a writ on these grounds, this Court held:

> The long established general rule is that the attempt to raise a federal question after judgment upon a petition for rehearing comes too late unless the court actually entertains the question and then decides it. *Id.* at 443.

See also Chicago I and L.R. v. McGuire, 196 U.S. 128 (1904); *Jett Brothers v. Carrollton*, 252 U.S. 1 (1919).

Furthermore, the court of appeals denied the motion for rehearing with no opinion as did the Texas Supreme Court deny the application for writ of error. As held in *Stembridge v. State of Georgia*, 343 U.S. 541 (1952):

> Where the highest court delivers no opinion and it appears that the judgment might have rested upon a nonfederal ground, this court will not take jurisdiction to review the judgment. *Id.* at 547.

Because Petitioners did not perfect their constitutional argument under the United States Constitution, this Court should deny certiorari to Petitioners.

PARENTAL IMMUNITY DOCTRINE IS CONSTITUTIONAL

Should this Court decide that the Petitioners did perfect their constitutional arguments and that the opinion of *Hall, supra* did not rest on "adequate and independent state grounds", Respondents urge that the Fourteenth Amendment arguments presented by Petitioners should fail. Petitioners attempt to invoke the United States Constitution's protection under the Fourteenth Amendment's Equal Protection Clause and Due Process Clause, which provide:

> No state shall . . . deprive any person of life, liberty, or property, without due process; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV, Sec. 1.

STANDARD OF REVIEW FOR CONSTITUTIONAL QUESTIONS

When a state's laws are attacked on equal protection grounds, the "state laws are generally entitled to a presumption of validity." *Parham v. Hughes*, 441 U.S. 347, 351 (1979). Different levels of scrutiny are applied for equal protection analysis depending upon the type of individual rights that are effected by the alleged discriminatory classification. A three tier analysis is used when ruling upon the equal protection claims under the Fourteenth Amendment to the United States Constitution, depending upon the rights and or classification under scrutiny. *Plyler v. Doe*, 457 U.S. 202 (1982); *Spring Branch I.S.D. v. Stamos*, 695 S.W.2d 558 (Tex. 1985), *appeal dismissed*, 475 U.S. 1001 (1986). This analysis starts by examining the classification created and determining whether this classification infringes upon a fundamental right or interest or burdens an inherently suspect class. *Plyler*.

Applying this analysis to the facts of this case, the inquiry focuses upon whether an unemancipated minor has a fundamental right to sue her parents for ordinary negligence. In *Lucas*, Justice Gonzalez in his dissenting opinion recognized that "the right accorded to a plaintiff to sue in tort for an injury is not a fundamental right." *Lucas* at 695 (Gonzalez J. dissenting) (citing *Sibley v. Board of Sup'rs of Louisiana*, 462 So.2d 149, 155, Opinion modified, 477 So.2d 1094 (La. 1985). The right to vote, the rights guaranteed by the First Amendment, the right to privacy, the right to procreate and the right to interstate travel have been identified as "fundamental rights". *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312

(1976) at FN3; *Clark v. State of Texas*, 665 S.W.2d 476 (Tex. Cr. App. 1984).

Respondents assert that Petitioners are misleading this Court in advancing their proposition that an unemancipated minor has a fundamental right to bring suit against her parents. In a case cited by Petitioners, *Moran v. Beyer*, 734 F.2d 1245, 1246 (7th Cir. 1984), the court held that the right of a spouse to bring suit against the other spouse is not a fundamental right. *Id.* Also, Petitioners have incorrectly used as authority the case of *White v. State*, 661 P.2d 1272 (Mont. 1983) in their assertion that the right to bring a civil action for personal injuries is a fundamental right. The court in *White* is interpreting the Montana Constitution, not the United States Constitution. Therefore, this case is inapplicable to our analysis. Further, the Court has held that the right to bring a cause of action in tort is not a fundamental right and the deprivation of that right is not a violation of due process. *Siegert v. Gilley*, 500 U.S. 226 (1991), *rehearing denied*, 111 S.Ct. 2290 (1991).

Because an unemancipated minor does not have a "fundamental" right to sue her parents, the analysis turns to whether the parental immunity doctrine as it now exists in Texas creates a suspect classification. The parental immunity doctrine does not create a suspect class as it neither infringes nor benefits a class of citizens based upon race, gender, or religious affiliation. *Plyler v. Doe*, 457 U.S. 202 (1982). " 'Suspect' classifications are only those classifications which are likely to reflect deep seated prejudice rather than legislative rationality in pursuit of a legitimate objective." *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988) (Children are not a suspect

class). The classifications that occur through the implementation of the parental immunity doctrine do not create invidious discrimination nor a suspect class.

Petitioners try to invoke an "intermediate" scrutiny standard based upon the unsubstantiated assertion that Katherine Singleton suffers from permanent brain impairment. (Petition for Writ of Cert. at p.16). However, the record does not contain any proof that Katherine Singleton suffered permanent brain injury, and Petitioners have not at any time from the date of the accident on June 2, 1987 until the present ever sought to have Katherine Singleton declared non-compos mentis. Therefore, since there is no evidence before this Court as to Katherine Singleton's condition it would be improper to invoke the intermediate scrutiny standard.

The "intermediate" scrutiny test should only be used when the "classification, while not facially invidious, nonetheless gives rise to recurring constitutional difficulties" requiring a substantial state interest for the classification. *Plyler* at 217, *citing, Craig v. Boren*, 429 U.S. 190 (1976). (Intermediate substantial interest test used in limited circumstances based upon gender, legitimacy, or alienage).

The Petitioners' reliance upon *Catlin v. Ambach*, 644 F. Supp. 161 (N.D. N.Y. 1986), is misplaced. Chief Judge Munson in *Catlin*, used an intermediate standard because, as he saw it, New York's residence statute created a subclass of children unable to enjoy tuition free public education, a state created right. He also held that the importance of receiving an education was the type of classification that gave rise to recurring difficulties. *Id.* at

166. However, a state's denial of a free education, a state created right, based on the nonresidence of biological parents of a handicapped minor, is clearly not analogous to the state of Texas carving out exceptions to the common law development of the parental immunity doctrine.

The Petitioners' reliance on *Catlin* is also inappropriate because that court was dealing with residence requirements related to a minor's right to education. The state of Texas has the right to exercise its independent jurisdictional power in adopting the concept of parental immunity. Further, the right to sue is fundamentally different from the state-created right to a public education. The societal interest in universal education and having a literate electorate does not compare with the social interest of allowing all unemancipated minors the opportunity to sue their parents for alleged negligence involving parental discretion.

Since it is clear there is no suspect class or fundamental right involved in this case, the proper test for an equal protection analysis is whether the classification is rationally related to a legitimate state interest. *Parham v. Hughes.*

> The Equal Protection Clause does not preclude the state from resorting to classification, but only requires that the classification be reasonable, not arbitrary, and rest on some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly situated will be treated alike. *Brown v. State*, 808 S.W.2d 628 (Tex. App. – Austin 1991, writ denied) citing to *Old Dearbourn Distributing Co. v. Seagram-Distillers Corp.*, 299 U.S. 183, 197 (1936).

Further this Court has stated:

> [E]ven if one characterizes the immunity defense as a statutory deprivation, it would remain true that the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational. *Martinez v. California*, 444 U.S. 277, 282 (1980) (upholding tort immunity for parole official).

Likewise, this Court in *Ferri v. Ackerman*, 444 U.S. 193, 198 (1979), recognized that "when state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless, of course the state rule is in conflict with federal law." This Court based the foregoing upon Art. VI, cl. 2 of the United States Constitution.

"Parental immunity is the law in Texas." *Hall* at 908. The state of Texas has a legitimate state interest in preventing judicial interference with parental discretion. This is because the integrity of the family unit is a vital and important institution in American society and has protection under the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment of the United States Constitution. *See, In the Interest of G.M.*, 596 S.W.2d 846 (Tex. 1980); *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed. 2d 551 (1972). The Texas Supreme Court recently characterized the purpose of the parental immunity doctrine as follows:

> The real objective of parental immunity . . . is not to promote family harmony; rather, it is

> simply to avoid undue judicial interference with parental discretion. The discharge of parental responsibilities, such as the provision of a home, food, and schooling, entails countless matters of personal private choice. In the absence of culpability beyond ordinary negligence, those choices are not subject to review in court.
>
> *Shoemake v. Fogel, Ltd.*, 826 S.W.2d 933, 936 (Tex. 1992).

The Texas parental immunity doctrine, as it presently exists, sets forth exceptions for intentional torts, the operation of motor vehicle by a parent, and business activities of a parent. *See Aboussie v. Aboussie*, 207 S.W.2d 636 (Tex. Civ. App. – Fort Worth 1954, writ ref'd); *Felderhoff v. Felderhoff*, 473 S.W.2d 928 (Tex. 1971); *Jilani By and Through Jilani v. Jilani*, 767 S.W.2d 671 (Tex. 1988). These exceptions provide ample opportunity for unemancipated minor children to seek redress for the injuries proximately caused by their parents in certain situations. The protection afforded by the Texas parental immunity doctrine for a parent's mere negligence in exercising reasonable parental discretion, supervision and judgment is rationally related to the states valid reluctance to second guess parent's management of purely family matters.

Raising a child is a delicate and unique function for the family, with reciprocal commitments that are not present between a child and a stranger. "Principles of freedom and democracy are closely interwoven with preserving the integrity of family decision making." *Brunner v. Brunner*, 770 F. Supp. 517, 523 (W.D. S. Dakota 1991). *Also see e.g., Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

Indeed, this Court has recognized that a parent's right to companionship, care, custody and management of his or her children is an important interest that warrants deference and absent a powerful countervailing interest, protection. *Lassiter v. Department of Social Services of Durham Co.*, 452 U.S. 18 (1981), *rehearing denied*, 453 U.S. 927 (1981). Additionally, the custody, care and nurturing of a child resides first in the parents, whose function and freedom include the preparation for obligation for which the state can neither supply nor hinder. *Ginsberg v. New York*, 390 U.S. 629 (1968). Personal decisions regarding child rearing have been recognized as protected liberties under the Fourteenth Amendment's Due Process Clause. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791,120 L.Ed.2d 674, 60 U.S.L.W. 4795 (1992).

The New York Court of Appeals probably articulated the best reason for a court's hesitance to venture into the area of parental discretion regarding the raising of children. In *Holodook v. Spencer*, 324 N.E.2d 338, 343 (N.Y. 1974), the court looked at the adverse impact that judicial intrusion would have on the "fundamental family relation between parent and child." The *Holodook* court stated:

> We can conceive of few, if any, accidental injuries to children which could not have been prevented, or substantially mitigated, by keener parental guidance, broader foresight, closer protection and better example. Indeed, a child could probably avoid most physical harm were he under his parents' constant surveillance and instruction, though detriment more subtle and perhaps more harmful then physical injury might result. *Id.* at 343.

After the doctrine of parental immunity was recognized in *Hewellette v. George*, 68 Miss. 703, 9 So. 885 (1891), forty-two other states adopted some form of parental immunity. Hollister, *Parent Child Immunity: A Doctrine In Search of Justification*, 50 Fordham L.Rev. 489, 494 (1981-82). There are many legitimate policy reasons providing the basis for parental immunity which include 1) the disruption of domestic tranquility, 2) the threat to parental discipline and control, 3) the proliferation of fraudulent and conclusive suits, and 4) the depletion of family resources. *Begley v. Kohl and Madden Printing Ink, Co.*, 157 Conn. 445; 254 A.2d 907 (1969); *Barlow v. Iblings*, 261 Iowa 713; 156 N.W.2d 105 (1968); *Skinner v. Whitley*, 281 N.C. 476; 189 S.E.2d 230 (1972); *Orefice v. Albert*, 237 So.2d 142 (Fla. 1970).

The Texas parental immunity doctrine is rationally related to a legitimate state interest so that the courts will not intrude into the realm uniquely within a family, while allowing judicial recourse when an accident occurs outside this realm. *See, Aboussie, Felderhoff and Jilani.* In *Shoemake* at 936, the Texas Supreme Court considered the issue of parental immunity and whether this theory of law bars a contribution claim in a case where allegations against the parent for negligent supervision and education of the child have been plead. In *Shoemake*, the mother of a two-year old infant filed suit for wrongful death and also as a representative of the child's estate in the survival action against an apartment complex owner under premises liability theories for the drowning of the child. The defendants in this case filed a claim for contribution against the mother in the survival action which was disallowed by the trial court. The Court of Appeals held that

the damages of the child's estate should be reduced by the percentage of fault assigned to the mother under comparative causation. *Fogel Ltd. A.T. v. Shoemake*, 795 S.W.2d 903, 908 (Tex. App. – Ft. Worth 1990, rev'd on other grounds).

In *Shoemake*, the Court recognized that a defendant lacked a claim for contribution unless the child had a claim against the mother for negligence. The Court reviewed the exceptions to parental immunity and held them inapplicable. This Court recognized that the doctrine of parental immunity applied to "alleged acts of ordinary negligence which involve a reasonable exercise of parental authority or the exercise of ordinary parental discretion with respect to provisions for the care and necessities of the child." *Shoemake* at 936. The Court further held that since the allegations against the mother were for negligence in the management, supervision and control of the child, the defendant's claims for contribution were barred as a matter of law by the parental immunity doctrine.

Just as in the *Shoemake* case, the Petitioners' allegations are for negligence in the management, supervision and control of the child and therefore are barred as a matter of law by the parental immunity doctrine.

"A child has no cause of action against a parent for injuries arising out of deficient supervision". *Fogel* at 906. The *Fogel* court recognized the continued validity of the parental immunity doctrine with the limited exceptions as recognized by the Texas Supreme Court.

The trial court's granting of Respondents' summary judgments and the appellate courts affirmance of same is rationally related to the reluctance of the courts to get

involved in parental supervision as it allows the court to examine the factual allegations surrounding an accident. If a parent's actions fall, as in this case, within the sphere of parental discretion and control, it is in the state's legitimate interest not to interfere. This is not an arbitrary decision, but a rational decision based upon the uniqueness of a parent/child relationship.

DUE PROCESS/OPEN COURTS DOCTRINE

Petitioners allege that their right to redress has been impaired by the parental immunity doctrine. Respondents contend that Petitioners' right of access to the court and due process rights have not been violated by the parental immunity doctrine.

The Fourteenth Amendment to the United States Constitution provides that no state shall deprive any person of life, liberty or property without due process of law. U.S. Const. Amend. XIV § 1. Similarly, the Texas Constitution provides that no citizen shall be deprived of life, liberty, property, privileges or immunities except by due course of law. Tex. Const. Art. I, § 19.

The Texas Constitution also provides that "all Courts shall be open, and every person for injury done him, in his land, goods, person or repudiation, shall have remedy by due course of law". Tex. Const. Art. I, § 13. The open Court's provision is a facet of Texas due process. *Sax v. Votteler*, 648 S.W.2d 661 (Tex. 1983). Texas Constitution Article I, § 13 ensures that Texas citizens bringing common law causes of action will not unreasonably be denied

the right to redress of injury. *Hanks v. City of Port Arthur*, 48 S.W.2d 944 (Tex. 1932).

In analyzing Petitioners' right to redress, the Texas courts examine two criteria: (a) whether the litigant has a cognizable common law cause of action that is being restricted; and (b) the reasonableness and extent of the restriction. *Sax*, at 666. Texas courts have long recognized common law causes of action entitling one to sue for injuries negligently inflicted by others. *Houston and Great Northern Railroad Co. v. Miller*, 51 Tex. 270 (1879). Petitioners' right to sue and be heard has not been impaired. Petitioners have been heard at all levels of Texas courts.

The second criteria that should be examined is the effect of the immunity on the litigant's right to bring his or her cause of action. *Sax*, at 666. This restriction must be weighed against the purpose of the parental immunity doctrine which was clearly annunciated in *Shoemake*.

The wisdom of the underlying policy determination regarding the Texas parental immunity doctrine is best determined by the State of Texas. As such there is no merit in Petitioner's contention that the parental immunity doctrine is unconstitutional when applied to defeat a tort claim arising under state law. *Martinez v. California*, 444 U.S. 277 (1981).

Finally, Petitioners still have valid and ongoing causes of action against the owner and operator of the motorcycle (Hicks) as well as the County of Montgomery, Texas. (*See*, Petition for Writ of Certiorari p. 6). The Petitioners have a right of redress.

Petitioners also advance the novel notion that a parent's death of natural causes, which are wholly unrelated to the tort on which the child's action is based, somehow eliminates the protection of the parental immunity doctrine. First of all, William Singleton passed away after this appeal was perfected. There is no evidence in the record regarding this fact, nor did the appeals court allow the plaintiff to supplement the record with the death certificate after the judgment was rendered. Therefore, the record does not support this argument. However, even if the death of respondent William Singleton, III had occurred prior to summary judgment, Petitioners' case law is still not applicable.

In *Sneed by McCullough v. Sneed*, 705 S.W.2d 392 (Tex. App. – San Antonio 1986, writ ref'd n.r.e.), a minor was allowed to proceed against her deceased father's estate for injuries sustained in a plane crash. The suit was not allowed because her father's death extinguished parental immunity; rather, the court held that the father's conduct was "not referable to his parental responsibilities to plaintiff." *Id.* at 397. As to the father's death, the court stated there would be no disruption of a family relationship "which terminated at the time that plaintiff's action under the wrongful death statute *accrued*." *Id.* (emphasis added). Further, this court has specifically disapproved *Sneed*. *Shoemake* at 973 n.3. Here, respondent William Singleton, III was alive, and maintained a family relationship with Petitioner Katherine Singleton at the time her alleged cause of action accrued. Therefore, parental immunity would apply.

Additionally, Petitioners argue that William Singleton, III lost the protection of the parental immunity

doctrine following his divorce to respondent, Jimmie Lynn Martin. Jimmie Lynn Martin is Katherine Singleton's natural mother and William Singleton, III was her natural father. Following their divorce, William Singleton, III was named possessory conservator. William Singleton, III did not cease being a parent to Katherine Singleton; he merely ended his legal relationship with her mother. To adopt Petitioners' argument would create serious repercussions in Texas family law.

Petitioners attempt to make the argument that the doctrine of parental immunity does not apply to William Singleton, III because he was not the custodial parent at the time of the accident. Petitioners cite two cases for that proposition. Both cases are mis-characterized.

Bondurant v. Bondurant, 386 So.2d 705 (La. App. 1980), a mother brought suit on behalf of her children against her former husband for injuries sustained to her minor children in an automobile accident caused by her former husband. Louisiana statutorily confines parental immunity to torts committed by parents during marriage or by the custodial parent following separation and divorce. *Id.* at 706-07. Texas has no such prohibition. *Bondurant* is not applicable since that same conduct has been recognized in *Jilani* as an exception to the doctrine of parental immunity. *Jilani* at 672-73. The case at bar has nothing to do with injuries sustained in an automobile accident in which William Singleton, III was driving.

In addition, Petitioners cite *Fugate v. Fugate*, 582 S.W.2d 663 (Mo. 1979) for the same proposition. Likewise, the case is not applicable. That case involved a cause of action **against a father by a child for the wrongful death of her mother**. *Id.* Again, this is out of the scope of the doctrine of parental immunity and totally inapplicable to

the facts of this case where a child is suing for personal injuries to herself.

Texas has never barred a non-custodial parent from claiming immunity. In addition, all acts alleged against William Singleton, III fit squarely within a parental role as recognized by this Court. *Jilani* at 672-673; *Felderhoff* at 932-933. This court must give deference to the State of Texas in its interpretation and application of the parental immunity doctrine. *Radio Station WOW v. Johnson*, 326 U.S. 120 (1945).

Additionally, the Petitioners advance the argument that Brent Martin should not be protected by the parental immunity doctrine because he is a step-parent. In contradiction to Petitioners' Petition for a Writ of Certiorari, footnote number 2 on page 22, Brent Martin would show this Court that he is alive and well and living in Conroe, Texas.

Petitioners' argument that a step-parent should not be afforded parental immunity is flawed and misleading to the Court. Brent Martin, as a step-parent is entitled to the same immunities as a natural parent. Brent Martin, as the step-parent of Katherine Singleton, stands *in loco parentis* because he voluntarily assumed the care and support of his step-child, Katherine Singleton. (Tr. at 399-400).

If a husband of a wife receives into his home the wife's child by a former husband, and holds it out to the world as a member of his family, the husband stands to the child *in loco parentis*. *Boyle v. Tully*, 134 S.W.2d 500, (Tex. Civ. App. – Galveston 1939, writ ref'd.); *Drescher v. Morgan*, 251 S.W.2d 173 (Tex. Civ. App. – Fort Worth 1952,

writ ref'd n.r.e.). A step-parent standing *in loco parentis* may exercise the control and authority of a parent. *Gorman v. State*, 42 Tex. 221 (1875). *Hall* at 905.

In *Franks v. Franks*, 138 S.W. 1110 (Tex. Civ. App. – Austin 1911, no writ), the court discussed the relationship between a step-father and a step-child. If a step-parent voluntarily assumes the care and support of a step-child, he stands *in loco parentis*, and the presumption is that they deal with each other as parent and child. *Id.* at 1110. In a step-parent/step-child relationship where a step-parent voluntarily assumes the care and support of the step-child, the ordinary rules of parent and child will be held to apply. *Id.* at 1110.

Brent Martin's actions of receiving Katherine Singleton into his home and assuming for her care caused him to stand to Katherine Singleton *in loco parentis*. The relationship between Brent Martin and Katherine Singleton is that of parent and child, and the ordinary rules of parent and child will be held to apply. *See Franks v. Franks; Boyle v. Tully; Drescher v. Morgan*; and *Hall v. Martin*.

Many jurisdictions, both State and Federal, have ruled that the parental immunity doctrine protects a step-parent. *See Gunn v. Rollings*, 157 S.E.2d 590 (1967); *London Guarantee & Accident Co., Ltd. v. Smith*, 68 N.W.2d 781 (1954); *DeLay v. DeLay*, 337 P. 2d 1057 (1959); *Van Wart v. Cook*, 557 P.2d 1161 (1976); *Rosenberg v. Silver*, 762 F.2d 255 (1985); *Trudell v. Leatherby*, 212 Cal. 678, 300 P. 7 (1931). Other jurisdictions have recognized that parental immunity extends to step-parents, but refused to apply the doctrine because of excessive assaultive conduct. *Wilson*

v. Wilson, 742 F.2d 1004 (1984); *Gillett v. Gillett*, 335 P. 2d 736 (1959). The parental immunity doctrine protects a variety of relationships that exist with a child provided the individual stands *in loco parentis*. The parental immunity doctrine has even been extended to foster parents, grandparents, and uncles that were shown to be standing *in loco parentis*. *See Mathis v. Ammons*, 453 F. Supp. 1033 (E.D. Tenn. 1978). *Newsome v. Department of Human Resources*, 199 Ga. App. 419, 405 S.E.2d 61 (Ga. App. 1991); *Bennett v. Bennett*, 194 Ga. App. 197, 390 S.E.2d 276 (Ga.App. 1990); *Lawber v. Doil*, 547 N.E.2d 752, (Ill. App. 4. Dist., 1989); *Thelen v. Thelen*, 435 N.W.2d 495 (Mich.App. 1989).

CONCLUSION

The Court does not have jurisdiction to grant Petitioners' writ because of the present, adequate, and independent state grounds to uphold the judgement. Secondly, the Petitioners have waived any federal constitutional issues by the failure to properly and timely present these issues to the state court below, nor is it evident from the record that either the Texas Supreme Court or the Court of Appeals in Beaumont ever considered a federal question in the consideration of this case. Therefore, the writ should be dismissed, or in the alternative, denied.

Lastly, even if the Petitioners had properly raised and preserved a federal question under the Fourteenth Amendment, the parental immunity doctrine as it exists in Texas withstands constitutional scrutiny, as it does not

affect a suspect class, nor does it infringe a fundamental right. The sovereignty of Texas should be respected in allowing the state to develop and interpret its own doctrines of civil law. Therefore, the court should deny writ.

Respectfully submitted,

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